2013 WL 7122492 (Miss.) (Appellate Brief)
Supreme Court of Mississippi.

Ida M. BLACK, et al., Appellants,
v.
Jerry M. CLARK, Administrator, et al., Appellees.

No. 2012-CA-01223.
March 5, 2013.

Civil Action No. 2011-0107 Oral Argument not Requested

Brief of Appellees Jerry M. Clark, Administrator of the Estate of Carl Black, Deceased, Jerry M. Clark, Individually and Shane M. Clark, On Appeal from the Chancery Court of Winston County, Mississippi

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III. TABLE OF AUTHORITIES

***1 REFERENCES IN BRIEF TO PARTIES**

Ida Mae Black is joined in the appeal by her children and together they are the Appellants. The Appellants, may be hereinafter referred to as "Ida Mae Black". The Appellees, may be hereinafter referred to as the "Clarks."

REFERENCES IN BRIEF TO TRIAL TRANSCRIPT, CLERK'S PAPERS AND RECORD EXCERPTS

References herein to the Trial Court Transcripts as prepared by the Court Reporter shall be designated by pages as (TT J;; references herein to the Clerk's Papers, pleadings, orders, etc., shall be designated by pages as (TR_) references herein to Appellants' Record Excerpts shall be designated by pages as (RE _); and references herein to Appellees' Record Excerpts shall be designated by pages as (ARE ___).

***2 IV. STATEMENT OF THE ISSUES**

Appellees adopt the statement of the issues proffered by the Appellants.

V. STATEMENT OF THE CASE

A. Nature of the Case

The factual issues presented in this appeal involve a contest over the 2009 Last Will and Testament of Carl Black. Ida Mae Black is the widow of Ivy W. Black, one of the named beneficiaries in the Will. The remaining Appellants are her children. Ivy W. Black predeceased his brother, Carl Black, by four days, causing the specific and residual devises to him in the 2009 Will to lapse. In her counterclaim contesting the validity of the 2009 Will, Ida Mae Black alleged that the 2009 Will did not express the true intent of Carl Black, her brother-in-law, and she asked the trial court to hold that an earlier, revoked 2007 Will - one in which she would have received the entirety of the Estate - be held as the true Last Will and Testament of Carl Black. In the alternative, Ida Mae Black asked that the trial court re-write the 2009 Will to include a savings clause leaving her the lapsed portion of the Estate and to also name her as Executrix. The Administrator successfully moved to dismiss the counterclaim on the ground that it did not state a claim upon which relief could be granted, and this Appeal ensued.

B. Course of Proceedings and Disposition in the Court Below

Appellees adopt the statement of the course of proceedings and disposition in the court below proffered by the Appellants.

C. Statement of Facts

In June 2007 Carl Black had prepared and executed his Last Will and Testament leaving the entirety of his estate to his brother Ivy W. Black. (TR 53, RE 21) The 2007 Will also ***3** included a savings clause leaving the entirety of the Estate to Ida Mae Black, the spouse of Ivy W. Black, in the event that Ivy W. Black predeceased Carl Black. Id. The 2007 Will also named Ivy W. Black as executor and Ida Mae Black as alternate executrix. Id.

In July 2009, Carl Black executed a new Last Will and Testament revoking the earlier 2007 Will and greatly reducing the property devised to his brother, Ivy W. Black. (TR 6, RE 21) In the 2009 Will, Carl Black made a specific devise of real property

to Ivy W. Black and another specific devise of real property to Jerry M. Clark, his step-son, and Shane M. Clark, his step-grandson. Id. The 2009 Will contained a remainder clause leaving the rest, reside and remainder of the Estate to Ivy W. Black, Shane M. Clark, and Jerry M. Clark, "share and share alike." Id. The 2009 Will also named Ivy W. Black as Executor. Id. The 2009 Will did not name an alternate executor or executrix and no savings clause was included for any of the three beneficiaries. Id. Ida Mae Black was not mentioned in the 2009 Will, and she is not an heir-at-law of Carl Black. (TR 148)

Ivy W. Black died on April 19, 2011, predeceasing his brother Carl Black, April 23, 2011, by four days. (TT 67, RE 17) On April 27, 2011, Jerry Michael Clark, one of the named beneficiaries under the 2009 Will, petitioned to probate the Will as an Administration with the Will Annexed, and was duly appointed as administrator. (TR 4) On December 28, 2011, Ida Mae Black filed a counterclaim contesting the 2009 Will. (TR 48, ARE 1) In her counterclaim, Ida Mae Black alleged that the 2009 Will did not express the true intent of Carl Black, and she asked the trial court to hold that the earlier, revoked 2007 Will be held as the true Last Will and Testament of Carl Black. *Id.* In the alternative, she asked that the trial court re-write the 2009 Will to include a savings clause leaving her the lapsed portion of the Estate and to name her as ***4** alternate executrix. *Id.* The counterclaim did not raise any issues as to testamentary capacity, undue influence, or lack of proper execution. *Id.*

On May 2, 2012, the Administrator filed a motion to dismiss for failure to state a claim upon which relief can be granted arguing that the Will was valid and without ambiguity, and as such the trial court need only look to the four corners of the Will to discern the intent of Carl Black. (TR 137, ARE 8) The Administrator raised lack of standing as an alternative ground for dismissing the counterclaim. In her response, Ida Mae Black argued that failure to include a savings clause or name an alternate executor made the Will ambiguous allowing the Court to look to parol evidence to discern the intent of Carl Black. (TR 144-47, ARE 11-14) She also argued that the inclusion of the term "share and share alike" in the residual clause was ambiguous. Id. The trail court granted the motion to dismiss the counter-claim. (TR 148-49, RE 13-14) A motion for re-hearing filed by Ida Mae Black on the trial court's order dismissing her counterclaim was also denied. (TR 171, RE 4) This appeal then ensued.

Beginning at the hearing on the Administrator's motion to dismiss, counsel for Ida Mae Black began making personal attacks and allegations of negligence against counsel for the Estate. (TT 50) Those personal attacks continue in Ida Mae Black's appeal brief. Those allegations are spurious and wholly without merit. Moreover, they are completely irrelevant to the issue of the expressed intent of Carl Black's 2009 Will. To the limited degree necessary, the allegations are discussed herein.

VI. SUMMARY OF THE ARGUMENT

The trial court properly determined that the 2009 Last Will and Testament of Carl Black was unambiguous and properly excluded parol evidence in determining the expressed intent of ***5** Carl Black. In dismissing the counterclaim, the trial court looked to the four comers of the Will in determining that it was valid on its face and that the expressed intent of the testator was clear. The trial court correctly determined that failure to name an alternate executor or to include a savings clause did not make the Will ambiguous. The trial court also correctly determined that the phrase "share and share alike" has a clear and unambiguous meaning and application under Mississippi law. Finally, the trial court properly ignored the allegations against counsel's handling of the Estate. The trial court's ruling granting the motion to dismiss the counterclaim of Ida Mae Black and denying her motion for reconsideration of that ruling should be affirmed.

VII. ARGUMENT

The counterclaim of Ida Mae Black contesting the validity of the 2009 Last Will and Testament of Carl Black alleged that the failure to include a savings clause or name an alternate executor caused the Will to be ambiguous. (TR 48, ARE 1) Ida Mae Black further alleged that the inclusion of the phrase "share and share alike" in the residual clause created an ambiguity. Id. She urged the trial court to hold that the 2009 Will was null and void and to revive the previously revoked 2007 Will. Id. In the alternative, Ida Mae Black urged the trial court to look to parol evidence in determining the true intent of Carl Black and to re-write the 2009 Will to include a savings clause and name her as alternate executor. Id. The trial court correctly held that the expressed intent in the 2009 Will was unambiguous and properly excluded parol evidence. (TR 148-49, RE 13-14) The

trial court looked to the four corners of the Will in determining that it was valid on its face and that the expressed intent of the testator was clear and unambiguous. Id.

A. DID THE TRIAL COURT ERR WHEN IT DID NOT STRIKE THE 2009 WILL OF CARL BLACK HAVING FOUND THAT IT DID NOT *6 REPRESENT THE INTENT OF CARL BLACK.

"As a rule of construction of written documents, parol evidence should not be allowed where the document is clear, definite and unambiguous. The expressed intent of the testator is the guiding star rather than what he wished or may have wished. The Court's inquiry is to look first within the 'four corners' of the document, and if no ambiguity exists within the writing, then no further search is needed or authorized." In re Roland, 920 So. 2d 539, 543 (Miss. Ct. App. 2006) (quoting Stovall v Stovall, 360 So. 2d 679, 681 (Miss. 1978)).

Ida Mae Black's brief is rife with misstatements of law and fact. She starts her argument with the statement that the Court concluded that the 2009 Will did not represent the intentions of Carl Black. Brief of Appellant "Br. Apt.", at p. 12. This is a gross misstatement of the record. The quoted statements of the trial court in her brief are from the hearing on the motion to reconsider; however, they were not taken from the Court's bench opinion, but from a portion of the hearing transcript where the Court was discussing the effect of the lapse while counsel were still making argument. (TT 130-32, RE 5-7) What the trial court did conclude at the hearing on the motion to reconsider can be found at the end of the hearing transcript and is as follows: We have before the Court the matter of Carl Black estate and the motion of Ida M. Black for new trial and/or reconsideration. The Court had previously ruled - had sustained the [administrator's] motion to dismiss based on the fact that the Court did not find the language in the will on its face was ambiguous and therefore subject to extrinsic evidence to develop what the intent of the testator was.

And the two issues as -- I'm absolutely convinced that the failure to name an alternate executor does not make a will ambiguous. The failure to have the so-called savings clause or anti-lapse provision in there, that is to provide for what would have happened had Ivy predeceased him, which is what in fact happened.

The question is whether that would be an ambiguous provision. All the case law I've seen indicates that it's not. I recognize -- and it does disturb me that we've got partial intestacy of a man that went to great lengths to keep from dying intestate. But I think our case law constricts me in this respect that unless there is something on the face of that instrument that's ambiguous, I don't find that it is. I've already found that it's not.

***7** I don't think I can sustain the motion to reconsider. Based on that, I overrule the motion to reconsider. (TT 137-37, RE 11-12)

Simply put, the Court did not determine that the 2009 Will failed to represent the intent of Carl Black. As the transcript reflects and as the trial court correctly determined in its Judgment Granting Motion to Dismiss, the expressed intent of the testator is unambiguous and the Court need only to look to the four corners of the Will in determining that expressed intent. (TR 148, RE 13)

B. DID THE TRIAL COURT ERR WHEN IT FAILED TO FIND THE 2009 WILL OF CARL BLACK WAS AMBIGIOUS ON ITS FACE.

C. DID THE TRIAL COURT ERR WHEN IT FAILED TO FIND THAT THE TOTALITY OF THE CIRCUMSTANCES REVEALED A LATENT AMBIGUITY IN THE 2009 WILL OF CARL BLACK.

Ida Mae Black argues that the failure to name an alternate Executor or include a savings clause causes the 2009 Will to be ambiguous. Br. Apt., at pp. 13-14. She further argues that the inclusion of the phrase "share and share alike" in the residual clause is an ambiguity. Id. The trial court correctly determined that no ambiguity existed.

Mississippi law does not require a testator to name an alternate executor in a will. Indeed, Mississippi law does not even require that an executor be named at all. Miss. Code Ann. § 91-7-39 (providing for the administration of wills when no executor is named). Since Mississippi law does not even require the naming of an executor, clearly the failure to name an alternate does not make the Will ambiguous.

Furthermore, the failure to include a savings clause does not make the will ambiguous. This Court was faced with that issue in *Roland* and determined that the absence of a savings clause did not make a will ambiguous. 920 So. 2d, at 543. In *Roland*, a husband and wife made similar wills, the wife's will contained a residual clause leaving half her estate to her biological ***8** children from a prior marriage and the other half to the husband. *Id.*, at 540-41. The husban's will also contained a residual clause leaving half his estate to his biological children from a prior marriage and the other half to the wife. *Id.* The wife died seven days before the husband died. *Id.* The wife's children contested the plain language of the husband's will and argued that the intent of the husband and wife was to divide the estate equally among all the children. Id. The chancellor entered summary judgment in favor of the husband's children and was affirmed. *Id.*

In affirming the chancellor, the Roland Court adopted much of the chancellor's analysis; an analysis that is equally applicable in this case.
The Court has reviewed the will, and finds that it is clear and unambiguous. The provision in question does not suggest confusion on the part of [husband] as to what should happen to his gift to [wife] should she predecease him. He specified that [wife] should received one-half of his residuary estate, which is clear, and was silent as to the effect of her predeceasing him. The legal effect of his silence on this matter is also clear.... [P]arol evidence is inadmissible to alter the terms of the document for the purpose of speaking to the matter on what should happen to [wife's] share of the residual estate should she pass on before him. The writing is clear and speaks for itself, and reference to other facts surrounding the execution of the will is unnecessary.

It is also well-established as a principle of law in this state that where the beneficiary of a residuary bequest predeceases the testator, and the beneficiary is not a child or descendant of the testator, the interest which would have passed to the beneficiary passes instead to the surviving heirs at law of the testator....

We agree with the chancellor. It does not take much forethought to realize that if [wife] predeceased [husband], there would be nothing for her heirs to take under this provision in [husband's] will, because [wife's] heirs could claim only through her, and [wife] would receive an undivided one-half interest in [husband's] residuary estate only if she survived [husband]. Id., at 541-42.

Here the pertinent facts, analysis, and results are the same. Carl Black executed a Will with clear language leaving a portion of his estate to his brother Ivy Black. (TR 6, RE 21) As in Roland, a savings clause was not included. The effect of which is clear and under Mississippi law. When Ivy Black predeceased his brother Carl, that portion of his estate lapsed. Miss. Code Ann. § 91-5-7. Moreover, lack of testamentary capacity was not raised by Ida Mae Black. (TR ***9** 48, ARE 1) The clear, unambiguous language of Carl Black's 2009 Will taken together with his testamentary capacity leaves but one conclusion, Carl Black "understoo[d] and appreciate[d] the nature and effect of his act, the natural objects or persons to receive his bounty, and their relation to him, and [was] capable of determining what disposition he desire[d] to make of his property." In re Rutland, 24 So. 3d 347, 351 (Miss. Ct. App. 2009).

In addition, the inclusion of the phrase "share and share alike" in the residual clause of the 2009 Will is not ambiguous. The term "share and share alike" causes the residual of the Estate to be shared equally among the three residual devisees. In Moffett v. Howard, 392 So. 2d 509 (Miss. 1981), a residual clause, very similar to the one at issue here, individually named nine devisees and also included the phrase "share and share alike." Prior to the testator's death, one sister and three brothers named in the residuary clause predeceased the testator. The Moffett Court looked to well settled Mississippi common law in determining:
"If the residuary gift itself lapses, such lapsed gift does not form a new residuum in the absence of specific language showing that this is testator's intention. If there is one residuary legacy, and such legacy lapses, it passes to the heir or next of kin as

intestate property if there is no gift over. If the residuum of the estate is given to two or more individually, and not as a class, and the gift to one of them lapses, the question is raised whether such lapsed gift should pass under the residuary clause to the other residuary legatee, or whether it should pass to testator's next of kin as intestate property, in the absence of language in the will which tends to show the disposition which testator intends to make of it under such circumstances. It is now settled, by the weight of authority, that a lapsed part of the residuum does not itself pass into the remainder of the residuum, but that it passes to testator's next of kin as intestate property." Id.

The Moffett Court ultimately held that as to the "4/9ths lapsed residue, the common law as applied in Mississippi requires the lapsed residue to descend by the laws of intestate distribution so long as the deceased residuary beneficiaries are not children of testator." Id. Accordingly the five surviving residual devisees received 1/9th each of the residual estate, and the remaining 4/9ths passed to the sole heir at law of the testator. Therefore, pursuant to this ***10** authority the lapsed residual devise to Ivy W. Black descends through the laws of intestate succession to the heirs-at-law of Carl Black, and the remaining two-thirds of the residual estate passes as provided for in the Will, to the step-son and step-grandson of Carl Black. As such, no ambiguity exists.

Finally, an analysis of patent versus latent ambiguity is inappropriate given the clear language of the 2009 Will. A patent ambiguity is one that is ambiguous in its face. Black's Law Dictionary 88 (8th ed. 2004). This is distinguished with a latent ambiguity, which is an ambiguity that arises by application of a patently unambiguous term to reality. Id. For example, the two terms can be used to describe a situation where a will mentions a relative by name and the testator actually has two relatives by the same name. Such a situation does not exist in this case.

Carl Black's 2009 Will is unambiguous and Ida Mae Black's arguments in favor of finding an ambiguity are contrary to Mississippi law. Mississippi law does not require a testator to name an alternate executor in a will. Furthermore, as the Roland Court determined the failure to include a savings clause does not make the will ambiguous. In addition, as the Moffett Court determined, the inclusion of the phrase "share and share alike" in the residual clause of the 2009 Will has a clear, unambiguous meaning.

D. DID THE TRIAL COURT ABUSE ITS DISCRETION WHEN IT FAILED TO EXERCISE ITS INHERENT EQUITY JURISDICTION AND OTHER TOOLS TO CORRECT AND REMEDY OBVIOUS MALPRACTICE AND ERRORS OF THE ELDERLY ATTORNEY WHO DRAFTED THE 2009 WILL OF CARL BLACK.

Having failed to cast doubt on the trial court's analysis and decision using substantive Mississippi law, Ida Mae Black turns instead to making personal attacks against the memory and legacy of her opposing counsel. The Clarks would urge the Court to strike or at the very least ***11** disregard the utterly spurious and unfounded allegations in the last section of her brief. The allegations have no basis in fact and can only be described as a desperate attempt to divert the Court's attention. Moreover the allegations, which deal with time periods far removed from July 2009, when the Will was prepared, are completely irrelevant to a determination of expressed intent. See Roland, 920 So. 2d, at 542 (noting generally parol evidence should be limited to "facts surrounding the execution of the will....").

For example, Ida Mae Black points to a deed that was prepared sometime in the past for Carl Black. Br. Apt., at p. 16. How that deed should impact the Court's analysis of the 2009 Will is simply a mystery; regardless, it is completely irrelevant to an analysis of expressed intent. Ida Mae Black goes on to argue that the failure to include a savings clause or name an alternate executor shows incompetence on the part of the drafter; however, in bringing her will contest she failed to raise lack of testamentary capacity. *Id.* As a result, her position can only be that Carl Black knew and understood the effect of his Will. *Rutland*, 24 So. 3d, at 351. In essence her argument is that although Carl Black knew what he was signing, the Court should overrule his expressed intent and re-write the 2009 Will or hold that the previously revoked 2007 will controls. These arguments could not be farther from what Mississippi law allows. *See Williams v. Gooch*, 44 So. 2d 57, 59 (Miss. 1950) (holding Court cannot add to or take away from terms of will or make a new will for parties); *see also* Miss. Code Ann. § 91-5-3 and Robert A. Weems, WILLS & ADMIN. OF ESTATES IN MISS. § 5:3 (3d ed. 2003) ("Even though a will in general is ambulatory and not effective until the

testator'S death, this is not true of the revocation clause. The most important consequence of this rule is that the revocation of the subsequent writing would not operate to revive the will it revoked.") Why Carl Black chose to re-write his will in 2009 is of no consequence. The simple fact is that it is undisputed that Carl Black caused the 2009 Will to be prepared and then caused it to be properly executed and attested. The Will itself ***12** is relatively short, and as argued herein it contains terms that have a clear, unambiguous meaning under Mississippi law.

Ida Mae Black goes on to argue that circumstances surrounding the handling of the estate should somehow shed light on the expressed intent of Carl Black. Br. Apt., at pp. 16-18. Although the Clarks agree that the ultimate inquiry is a determination of the expressed intent of Carl Black, how occurrences in 2011 and 2012 - two to three years after the Will was prepared - impact that analysis is unclear at best. Not only do Ida Mae Black's arguments fail to show mishandling of the Estate, they are irrelevant and clearly without merit. As counsel for the Clarks stated at the March 8, 2012 subpoena hearing, the actions taken in naming Ida Mae Black as a party and putting Estate funds in trust were taken at the direction of the trial court. (TT 22) Regardless, they occurred in 2011 and 2012 and have absolutely zero relevance to a determination of the expressed intent of the 2009 Will.

Ida Mae Black then attacks the handling of the heirship hearing in May 22, 2012. The Clarks' counsel spent a great deal of time contacting various heirs in order to determine who should be the rightful heirs of Carl Black. (TT 88) Counsel was aware that many members of the Black family would be attending the heirship hearing and had prepared to call those members at the hearing. At the hearing certain facts as to heirship were stipulated and witnesses were called to determine and verify the heirs. (TT 89-97) The Court then made its judgment determining the heirs without opposition or protest on the part of Ida Mae Black or any of her children. (TT 100, TR 150) Regardless, this happened in 2012, and it is completely irrelevant to a determination of the expressed intent of the testator in his 2009 will.

Ida Mae Black raises what she views as the mishandling of the probate process as an argument that this Court must do equity. She makes no argument as to why the alleged mishandling of the Estate is relevant to a determination of the expressed intent of the Carl ***13** Black's 2009 will. Indeed none can be made, her allegations are simply irrelevant to that analysis.

VIII. CONCLUSION

In dismissing the counterclaim of Ida Mae Black, the trial court correctly looked to the four corners of the 2009 Will in determining that it was valid on its face and that the expressed intent of Carl Black was clear and without ambiguity. In making that determination, the trial court considered the arguments of Ida Mae Black in favor of finding an ambiguity. The trial court correctly determined that Mississippi law does not require a testator to name an alternate executor in a will. Moreover, the trial court looked to the analysis of the Roland Court in determining that the failure to include a savings clause does not make the Will ambiguous. The trial court considered the determination by the Moffett Court in holding that the phrase "share and share alike" has a clear and unambiguous meaning and application. Finally, the trial court properly ignored the allegations against the Clarks' counsel. The 2009 Last Will and Testament of Carl Black is unambiguous in any respect and its terms are clear as is their application under Mississippi law. The trial court's ruling granting the motion to dismiss the counterclaim of Ida Mae Black and denying her motion for reconsideration should be affirmed.

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